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No. 05-380

In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
PETITIONER

v.

LEROY CARHART, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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Pursuant to Rule 15.8 of this Court, the Solicitor General, on behalf of the Attorney General of the United States, files this supplemental brief to inform the Court of new authorities relevant to the disposition of the petition for a writ of certiorari. Since the filing of the reply brief in this case, this Court has issued its decision in *Ayotte* v. *Planned Parenthood of Northern New England*, 126 S. Ct. 961 (2006). In addition, two more courts of appeals have held that the federal Partial-Birth Abortion Ban Act of 2003 is unconstitutional. See *Planned Parenthood Federation of America, Inc.* v. *Gonzales*, No. 04-16621, 2006 WL 229900 (9th Cir. Jan. 31, 2006); *National Abortion Federation* v. *Gonzales*, No. 04-5201-CV, 2006 WL 225828 (2d Cir. Jan. 31, 2006). As explained below, those decisions underscore the need for the Court to grant review in this case to address the constitutionality of the Act.

1. In *Ayotte*, this Court considered a facial challenge to the constitutionality of New Hampshire's Parental Notification Prior to Abortion Act, which did not contain an express statutory exception for cases in which a medical emergency necessitated an immediate abortion. 126 S. Ct. at 964-965. New Hampshire conceded the possibility of applications of the statute in emergency situations that could create significant health risks and that "it would be unconstitutional to apply [the statute] in a manner that subjects minors" to such risks. *Id.* at 967. In light of that concession, and because "[o]nly a few applications of [the statute] would present a constitutional problem," the Court vacated the court of appeals' decision invalidating the statute in its entirety and remanded for a determination as to whether a narrower injunction, prohibiting only the statute's unconstitutional applications, could be crafted consistent with legislative intent. *Id.* at 969. The Court thus limited itself to "address[ing] a question of remedy," *id.* at 964, and, in light of New Hampshire's concession, did not consider whether the statute was required to contain an express health exception.

2. In *Planned Parenthood Federation*, the Ninth Circuit held that the federal Partial-Birth Abortion Ban Act of 2003 was unconstitutional, and, after expressly considering the effect of *Ayotte*, further held that the Act should be enjoined in its entirety. The court first held that the Act was facially invalid because it lacked a health exception. 2006 WL 229900, at *6-*9. The court of appeals construed this Court's decision in *Stenberg* v. *Carhart*, 530 U.S. 914 (2000), as holding that "an abortion regulation that fails to contain a health exception is unconstitutional except when there is a medical consensus that no circumstance exists in which the procedure would be necessary to preserve a woman's health." *Planned Parenthood Federation*, 2006 WL 229900, at *6. The court of appeals acknowledged that Congress had made various factual findings concerning the necessity of a health

exception. *Id.* at *7. In response to the government's contention that Congress's findings were entitled to deference, the court asserted that "th[is] Court's treatment of the level of deference to be applied to congressional findings that bear on the constitutionality of statutes has been less than clear." *Ibid.* The court ultimately did not resolve the question of the level of deference due to Congress's findings, however, on the ground that, "[u]nder even the most deferential level of review," Congress's threshold finding that "[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion * * * is never medically necessary," Act § 2(1), 117 Stat. 1201, would not be entitled to deference. *Planned Parenthood Federation*, 2006 WL 229900, at *7. The court thus rejected the government's submission that the relevant question was whether deference was owed to Congress's ultimate finding that "partial-birth abortion is never medically indicated to preserve the health of the mother," Act § 2(14)(O), 117 Stat. 1206. *Planned Parenthood Federation*, 2006 WL 229900, at *9.

The court of appeals also held that the Act was facially invalid on the alternative grounds that it reached some other types of abortions besides D&X abortions (and therefore, in the court's view, imposed an undue burden on a woman's access to an abortion) and that it contained ambiguous language that arguably reached some other types of abortions (and therefore, in the court's view, was unconstitutionally vague). *Planned Parenthood Federation*, 2006 WL 229900, at *10-*16.

Applying this Court's decision in *Ayotte*, the court of appeals then held that the Act should be enjoined in its entirety. *Planned Parenthood Federation*, 2006 WL 229900, at *17-*20. As a preliminary matter, the court noted that, if the Act were facially invalid solely because it lacked a health exception, the court "might have been able to draft a more 'finely drawn' injunction." *Id.* at *17. The court reasoned,

however, that a narrower injunction would not have been appropriate even in that instance, because such an injunction would be inconsistent with Congress's intent in promulgating the Act. *Ibid.* The court explained that, in its view, the Act's sponsors believed that the Act would have little force or effect if it contained a health exception. *Ibid.*

The court of appeals ultimately concluded, however, that "we need not rest our decision as to the appropriate remedy solely on the omission of a health exception" because the Act was also unconstitutional on other grounds. *Planned Parenthood Federation*, 2006 WL 229900, at *19. In order to remedy all of the asserted constitutional deficiencies, the court contended that it would "in effect have to strike the principal substantive provision that is now in the Act," leaving a statute that was substantially different from (and narrower than) the one that Congress enacted. *Ibid.*

3. a. In *National Abortion Federation*, a divided panel of the Second Circuit held that the Act was unconstitutional because it lacked a health exception. Like the Eighth Circuit in this case, the Second Circuit construed this Court's decision in *Stenberg* as holding that a health exception is necessary where "'substantial medical authority' support[s] the proposition that prohibiting the D&X procedure 'could endanger women's health.'" 2006 WL 225828, at *5 (quoting *Stenberg*, 530 U.S. at 938). The court determined that it was "[u]nquestionabl[e]" that such "substantial medical authority" existed, because it was "abundantly revealed" both in the evidence before Congress and in the evidence presented to the district court. *Ibid.* Unlike the Ninth Circuit in *Planned Parenthood Federation*, however, the Second Circuit seemingly rejected the proposition that Congress's factual findings concerning the necessity of a health exception were entitled to deference. *Id.* at *6. The court reasoned that "*Stenberg* does not leave it to a legislature (state or federal) to make a finding as to whether a statute prohibiting an

abortion procedure constitutionally requires a health exception"; instead, "*Stenberg* leaves it to the challenger of the statute * * * to point to evidence of 'substantial medical authority' that supports the view that the procedure might sometimes be necessary to avoid risk to a woman's health." *Ibid.* "Taking our instruction from the Supreme Court's decision in *Stenberg*," the court concluded, "we answer that question in the affirmative." *Ibid.*

Unlike the Ninth Circuit, the Second Circuit did not decide the question of the appropriate remedy in the wake of *Ayotte*, but instead ordered supplemental briefing on that question. *National Abortion Federation*, 2006 WL 225828, at *7-*9. In doing so, the court noted that the remedial question was framed by the court's "ruling that the Act is unconstitutional for lack of [a health exception]." *Id.* at *8.

b. Chief Judge Walker concurred. He stated that his decision to join the majority opinion was based on his "duty to follow [this Court's] precedent" in *Stenberg*, but that he was writing separately "to express certain concerns with the Supreme Court's abortion jurisprudence generally and with *Stenberg* in particular." *National Abortion Federation*, 2006 WL 225828, at *9. According to Chief Judge Walker, the Court's decision in *Stenberg* was "flawed" in "at least three respects." *Ibid.* First, *Stenberg* "equates the denial of a potential health benefit (in the eyes of some doctors) with the imposition of a health risk and, in the process, promotes marginal safety above all other values." *Ibid.* Second, *Stenberg* "endorses a rule that permits the lower courts to hold a statute facially invalid upon a speculative showing of harm." *Ibid.* Third, *Stenberg* "establishes an evidentiary standard that all but removes the legislature from the field of abortion policy." *Ibid.* "In the end," Chief Judge Walker observed, "I cannot escape the conclusion that, in * * * abortion cases, the federal courts have been transformed into a sort of super regulatory agency—a role for which courts are institution-

ally ill-suited and one that is divorced from accepted norms of constitutional adjudication." *Id.* at *14.

c. Judge Straub dissented. He reasoned that the "fundamental error" with the majority's approach was "to collapse the inquiry into whether a 'division of medical opinion' exists and thereby discard any role for congressional findings about the actual necessity of the procedure." *National Abortion Federation*, 2006 WL 225828, at *15. Under *Stenberg*, he explained, "the ultimate issue remains the necessity of D&X in preserving women's health, to be determined based on substantial medical authority." *Id.* at *18. According to Judge Straub, *Stenberg* "did not set down an immutable ban on the passing of a statute banning D&X without a health exception or suggest that the division of medical opinion alone could require such an exception." *Ibid.*

Judge Straub then rejected the majority's view that "*Stenberg* renders Congress's findings irrelevant." *National Abortion Federation*, 2006 WL 225828, at *18. Instead, because *Stenberg* "did not discuss the impact of legislative findings," it "should not be interpreted to preclude Congress from conducting its own analysis of whether a health exception is necessary." *Ibid.* Judge Straub noted that this Court had required deference to legislative findings even in cases not subject to rational basis review, *id.* at *20, and that Congress, in making its findings, "did not challenge or otherwise dispute that *Stenberg* controls as a matter of constitutional law," *id.* at *22. Judge Straub then concluded that "[Congress's] findings are well supported and worthy of deference under any standard." *Ibid.* He asserted that the evidence before Congress supported the conclusion that no medical circumstances require a D&X abortion in order to protect a woman's health, *id.* at *23; that no data suggested that D&X abortions were either safe or relatively safer than other types of abortions, *id.* at *24; and that the district court's own findings supported Congress's, *ibid.* Judge Straub also

rejected the alternative arguments that the Act imposed an undue burden and that the Act was unconstitutionally vague. *Id.* at *27-*28.

More broadly, Judge Straub asserted that the challenge to the constitutionality of the Act "require[d] a new assessment of the competing interests" identified in this Court's abortion decisions. *National Abortion Federation*, 2006 WL 225828, at *28. At the point at which a substantial portion of the fetus is outside the body of the mother, he reasoned, "the mother's right to privacy, autonomy, and bodily integrity are waning in importance, and the fetus's increases in strength." *Ibid.* And he suggested that the government also had a compelling interest in "protecting the line between abortion and infanticide." *Id.* at *29. Judge Straub concluded that he "f[ou]nd the current expansion of the right to terminate a pregnancy to cover a child in the process of being born morally, ethically, and legally unacceptable." *Id.* at *30.

4. a. The Court's narrow remedial ruling in *Ayotte* does not shed any light on the threshold question presented in this case concerning the constitutionality of the Act. The recent decisions of the Second and Ninth Circuits, however, confirm that the Court should grant certiorari in this case to address that question. Three courts of appeals have now held that a landmark Act of Congress is unconstitutional and declined to set aside injunctions preventing it from taking effect. Although those courts have reached similar results, they have employed divergent reasoning in doing so, and two judges have suggested either that the Act should be upheld under this Court's prior decisions or that those decisions should be reconsidered. Besides the three cases that have been decided by the courts of appeals to date, the government is aware of no other currently pending case challenging the constitutionality of the Act.[1] The timing is

[1] Since the filing of the petition in this case, the Commonwealth of Virginia has filed a petition seeking review of the Fourth Circuit's decision

therefore ideal for the Court to consider, and resolve, the Act's constitutionality. Indeed, even the Ninth Circuit, which held that the Act was unconstitutional, recognized that "[t]he question of the constitutionality of statutes that regulate 'partial-birth abortions' is of substantial importance and requires as prompt an answer as possible." *Planned Parenthood Federation*, 2006 WL 229900, at *9 n.15.

This case is an attractive vehicle for consideration of the Act's constitutionality. The court of appeals squarely held that the Act was facially invalid on the ground that it lacked a health exception—the primary ground on which the Act has been challenged. See Pet. App. 1a-25a. In addition, if necessary, this case presents the Court with the opportunity to address the subsidiary challenges that have been made to the Act as well. The district court held that the Act was also facially invalid on the ground that it imposed an undue burden on a woman's access to an abortion by reaching beyond D&X abortions, see *id.* at 515a-521a, and respondents contended before the court of appeals that the district court's decision should be sustained on that basis. In this case, therefore, the Court could consider not only the health-exception issue—which has been the focus of the litigation in the lower courts on the constitutionality of the Act—but also the undue-burden issue, if the Court chooses to reach it. Indeed, in *Stenberg*, the Court addressed both issues even though the court of appeals passed on only one. See Pet. 21-22 n.2. Granting certiorari in this case would thus enable the

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invalidating a Virginia statute prohibiting partial-birth abortions. See *Herring* v. *Richmond Med. Ctr. for Women*, No. 05-730 (filed Dec. 1, 2005). That statute, like the federal Act, does not contain an express health exception. The Court's docket indicates that the petition in *Herring* is likely to be considered at the Court's March 17 Conference. Because this case presents similar issues to those presented in *Herring*—but additional issues that are not (*e.g.*, the degree of deference owed to congressional findings concerning the necessity of a health exception)—the Court may wish to hold the petition in *Herring* if it grants certiorari in this case.

Court to consider, and resolve, all of the principal issues concerning the constitutionality of the Act.[2]

b. There is also no need for the Court to vacate the decision below and remand for further consideration in light of this Court's decision in *Ayotte*, *supra*. Despite some overlap of issues, this case is critically different from *Ayotte*. As Judge Straub recognized, the remedial issue was squarely presented in *Ayotte* because New Hampshire conceded that its statute would be unconstitutional in at least some applications; in this case, by contrast, the federal government has not made a similar concession. *National Abortion Federation*, 2006 WL 225828, at *18 n.12. As a result, the remedial question in this case does not arise unless and until the Act is held unconstitutional. Moreover, as the Second and Ninth Circuits have recognized, the answer to that remedial question necessarily depends on the *extent* to which the Act is unconstitutional. See *Planned Parenthood Federation*, 2006 WL 229900, at *19; *National Abortion Federation*, 2006 WL 225828, at *7-*8. The result of a decision to vacate and remand in this case would be to force the court of appeals or district court to answer the remedial question based on a determination concerning the constitutionality of the Act that may turn out to be entirely (or partially) incorrect. Moreover, the Ninth Circuit's post-*Ayotte* decision to invalidate

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[2] The Ninth Circuit also held that the Act was facially invalid on the ground that the Act was unconstitutionally vague. See *Planned Parenthood Federation*, 2006 WL 229900, at *13-*16. As the Ninth Circuit's analysis made clear, however, the argument that the Act was unconstitutionally vague substantially overlapped with the argument that the Act was unconstitutionally overbroad (and therefore imposed an undue burden). See, *e.g.*, *id.* at *14, *16. Although respondents in this case did not expressly argue before the court of appeals that the Act was unconstitutionally vague, they did advance such an argument before the district court, and, in light of the close relation between the vagueness and overbreadth arguments, it would be appropriate for the Court to address the vagueness argument in this case if it wishes to do so.

the Act in its entirety suggests that vacating and remanding in this case would not narrow the dispute or eliminate the prospect that an Act of Congress has been enjoined in its entirety in at least one circuit. Instead, this Court should grant review and definitively resolve the constitutionality of the Act in this case. If review is granted, the Court may render the remedial question wholly irrelevant by holding that the Act is constitutional. Alternatively, if the Court were to conclude that the Act is unconstitutional in any respect, it could exercise its discretion to reach the remedial question itself, or remand the case so that the court of appeals can address that issue in the first instance in light of the Court's analysis on the Act's constitutionality.

The extended analysis and differing views offered by the recent decisions of the Second and Ninth Circuits concerning the constitutionality of the Act reinforce the need for this Court's review. The fact that the Act remains enjoined in those circuits, as well as in the Eighth Circuit, underscores the need for a prompt resolution by this Court. Denying certiorari, or even vacating and remanding, would unduly postpone the ultimate resolution of the extraordinarily important question of the Act's constitutionality.

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For the foregoing reasons and those stated in the petition and the reply brief, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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